

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-150538
	:	TRIAL NO. B-0506290
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
JOSHUA FIKES,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Joshua Fikes appeals from the Hamilton County Common Pleas Court’s judgment overruling his Crim.R. 33(B) motion for leave to file a motion for a new trial. We affirm the court’s judgment.

Fikes was convicted in 2006 of murder and having weapons under a disability. We affirmed his convictions on appeal, and the Ohio Supreme Court declined to accept jurisdiction in his appeal there. *State v. Fikes*, 1st Dist. Hamilton No. C-060581, 2007-Ohio-5870, *appeal not accepted*, 117 Ohio St.3d 1426, 2008-Ohio-969, 882 N.E.2d 446.

In 2015, Fikes challenged his convictions in two motions. The first motion sought leave under Crim.R. 33(B) to file a motion for a new trial pursuant to Crim.R. 33(A)(4) and (5), on the grounds that the evidence had been insufficient to support his murder conviction, and that the law as “clarified” by the Ohio Supreme Court’s 2014 decision in *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, required trial counsel to request, and the trial court to deliver, an instruction on voluntary

manslaughter as a lesser offense of murder. The second motion sought, on the same grounds, relief under the new-trial statute, R.C. 2945.79(D), in the form of modification of his murder verdict to a voluntary-manslaughter verdict. The common pleas court entered judgment “Denying Defendant’s Motion for New Trial.” In this appeal from that judgment, Fikes advances two assignments of error.

We overrule the first assignment of error, in which Fikes asserts that the common pleas court abused its discretion in denying leave to file a new-trial motion.

The entry from which Fikes appeals, “Denying Defendant’s Motion for New Trial,” expressly denied him the ultimate relief sought in his Crim.R. 33(B) motion for leave to file a new-trial motion, and it effectively denied him leave to move for a new trial. Crim.R. 33(B) requires that a Crim.R. 33(A)(4) or (A)(5) motion for a new trial be filed either within 14 days of the return of the verdict or within seven days after leave to file a new-trial motion has been granted. The rule imposes upon a defendant seeking leave to move for a new trial out of time the burden of proving by “clear and convincing” evidence that he had been “unavoidably prevented” from timely filing his new-trial motion.

In affirming Fikes’s convictions in his direct appeal, we overruled assignments of error challenging the weight and sufficiency of the evidence and his trial counsel’s failure to request, and the trial court’s failure to deliver, a voluntary-manslaughter instruction. In *Wine*, the Ohio Supreme Court did not, as Fikes asserts, announce a new rule governing lesser-included-offense instructions, but rather “clari[fied] [by] restating” the rule concerning those instructions announced in 1980 in *State v. Wilkens*, 64 Ohio St.2d 382, 415 N.E.2d 303 (1980). Fikes thus failed to demonstrate that he had been unavoidably prevented from timely moving for a new trial on the grounds of insufficient evidence or the failure to instruct on voluntary manslaughter as a lesser offense of

murder. Therefore, the common pleas court did not abuse its discretion in denying him leave under Crim.R. 33(B) to move for a new trial.

We do not reach the merits of Fikes's second assignment of error, in which he contends that the common pleas court erred in failing to modify his murder verdict.

This court has jurisdiction to review only the judgment from which Fikes appeals. That judgment, "Denying Defendant's Motion for New Trial," effectively denied him the relief sought in his Crim.R. 33(B) motion for leave to file a new-trial motion, but it neither denied nor granted the relief sought in his R.C. 2945.79(D) motion to modify his murder verdict. Fikes could not appeal from, because the common pleas court did not enter, judgment overruling his R.C. 2945.79(D) motion to modify. Accordingly, this court has no jurisdiction to review his second assignment of error. *See State v. Gipson*, 1st Dist. Hamilton Nos. C-960867 and C-960881, 1997 WL 598397 (Sept. 26, 1997).

We, therefore, affirm the judgment of the common pleas court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**MOCK, P.J., CUNNINGHAM and ZAYAS, JJ.**

To the clerk:

Enter upon the court's journal on March 24, 2017  
per order of the court. \_\_\_\_\_.

Presiding Judge